

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

LG.PHILIPS LCD CO., LTD.,

Plaintiff,

v.

CHI MEI OPTOELECTRONICS
CORPORATION, et al.

Defendants.

Civil Action No. 06-726 (GMS)

Civil Action No. 07-357 (GMS)

CONSOLIDATED CASES

**LG.PHILIPS LCD CO., LTD.'S ANSWERING BRIEF IN
OPPOSITION TO CHI MEI OPTOELECTRONICS USA, INC.'S
MOTION TO DISMISS AND/OR STRIKE ADDITIONAL COUNTERCLAIMS**

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NATURE AND STAGE OF THE PROCEEDINGS

On December 1, 2006, Plaintiff LG.Philips LCD Co., Ltd. (“LPL”) filed a Complaint for Patent Infringement against Defendants Chi Mei Optoelectronics Corporation (“CMO”); AU Optronics Corporation (“AUO”); AU Optronics Corporation America (“AUO America”); Tatung Company; Tatung Company of America, Inc. (the “Tatung Defendants”); and ViewSonic Corporation (“ViewSonic”) alleging infringement of three of LPL’s United States LCD technology patents in Case No. 06-726-GMS (the Honorable Gregory M. Sleet presiding) (the “Delaware Case”). (D.I. 1.)¹

Instead of filing counterclaims in the 06-726 case, on March 8, 2007, AUO filed an infringement action regarding patents directed at LCD technology in the Western District of Wisconsin against LPL and its subsidiary, LG.Philips LCD America, Inc. (“LPLA”). On May 30, the Honorable John C. Shabaz transferred AUO’s Wisconsin action to this Court for consolidation with the 06-726 case. (D.I. 49, Ex. 1, Case No. 07-357.) The two cases were consolidated on June 19. (D.I. 100, Case No. 07-357.)

Similarly, instead of filing counterclaims in the 06-726 case, on May 4, 2007, CMO filed an infringement action regarding patents directed at LCD technology in the Eastern District of Texas against LPL and its subsidiary, LPLA. At the same time, CMO challenged personal jurisdiction and sufficiency of service of process. (D.I. 19.) CMO USA, as a Delaware corporation, cannot challenge personal jurisdiction and instead seeks to strike claims in an apparent attempt to benefit CMO’s effort to avoid Delaware.

¹ Unless otherwise indicated, all D.I. numbers listed reference documents filed in Civil Action No. 06-726 (GMS).

In response to AUO's complaint in the transferred 07-357 case, on June 11, 2007, LPL filed an Answer and Counterclaims against AUO, AUO America, CMO, and Chi Mei Optoelectronics, USA, Inc. ("CMO USA"). (D.I. 72-73, Case No. 07-357.) CMO USA, was served with the counterclaims on June 12. (D.I. 75, Case No. 07-357.) Plaintiff AUO replied to LPL's counterclaims and asserted additional patents in the form of counterclaims against LPL and LPLA on June 21. (D.I. 81-82, Case No. 07-357.) AUO America also replied and asserted counterclaims against LPL. (D.I. 80, Case No. 07-357.) Plaintiff AUO and AUO America later amended their replies against LPL on July 10. (D.I. 92-93, Case No. 07-357.) CMO USA replied to LPL's counterclaims on July 2 and asserted new counterclaims against LPL. (D.I. 87, Case No. 07-357.)

LPL replied to CMO USA's counterclaims on July 23. (D.I. 101, Case No. 07-357.) LPL and LPLA replied to Plaintiff AUO's and Counterclaim Defendant's counterclaims on July 24 (D.I. 102-103, Case No. 07-357,) but LPL then amended its replies on August 8. (D.I. 124-125.) LPL's reply included counterclaims against AUO, AUOA, CMO, and CMO USA. Plaintiff AUO and Counterclaim Defendant AUO America replied to LPL's additional counterclaims with additional counterclaims of their own on August 22. (D.I. 134-135.) LPL answered those additional counterclaims on September 14. (D.I. 138-139.)

SUMMARY OF ARGUMENT

1. As CMO USA concedes, the District of Delaware recognizes that Federal Rule of Civil Procedure 7 provides that a party may counterclaim in reply to a counterclaim. CMO USA's attempt to create a third-party exception to this rule must fail. No such distinction is made in the rule or the case law, nor does any distinction make

sense. Indeed, Rule 13(h) explicitly authorizes asserting counterclaims against third-parties. In addition, with respect to LPL's latest counterclaims, CMO USA is no longer a new third-party. CMO USA has already been joined as a party to this action through prior counterclaims and answered and pled its own counterclaims in this case, before LPL asserted the counterclaims at issue here.

2. The Federal Rules of Civil Procedure aim to reduce burdens on the courts and parties by avoiding multiple lawsuits, minimizing the circuitry of actions, and fostering judicial economy. LPL sought to enforce its LCD technology patent rights in Delaware against infringing parties, AUO, AUO America, CMO and CMO USA. Instead of following the aims of the Federal Rules of Civil Procedure, AUO and CMO sought to spread this dispute out over the entire country by filing lawsuits in Wisconsin and Texas instead of asserting counterclaims in Delaware. Now, as the pleadings wind to a close in Delaware, CMO's subsidiary CMO USA seeks to create duplicative suits and waste judicial resources by asking this court to dismiss and/or strike some of LPL's LCD technology patent claims against companies that are already parties to this LCD technology patent case and forcing LPL to bring those claims in a separate suit. That would make no sense and would waste judicial time.

3. CMO USA's unduly complicated argument lacks merit. Rule 13 aims to settle all the disputes between parties in one suit. Nothing in the Federal Rules authorizes a court to reject a properly pleaded counterclaim, whether compulsory or permissive.

4. Leave to file additional counterclaims in a reply to counterclaims is not required under the Federal Rules and CMO USA's argument to the contrary finds no basis in the Federal Rules or this District's precedent. CMO USA is essentially asking

this Court to change the pleading rules for LPL as the pleadings near a close and then to deprive LPL of an opportunity to follow those new rules. This unjust request should be rejected.

STATEMENT OF FACTS

The relevant facts are set forth in the Nature and Stage of the Proceedings section.

ARGUMENT

I. LPL PROPERLY ASSERTED COUNTERCLAIMS IN REPLY TO AUO'S COUNTERCLAIMS.

The Federal Rules of Civil Procedure explicitly include a reply to a counterclaim as a permissible pleading. Fed. R. Civ. P. 7(a) In fact, the Federal Rules mandate a reply to a counterclaim, stating clearly that “[t]here shall be . . . a reply to a counterclaim if denominated as such.” Id. Furthermore, the Rules later state the following:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a) (emphasis added).

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Fed. R. Civ. P. 13(b) (emphasis added). Very simply, pursuant to Fed. R. Civ. P. 7(a), a reply to a counterclaim is a permitted pleading and, pursuant to Fed. R. Civ. P. 13(a) and 13(b), counterclaims may be asserted in a pleading.

As explained in a District of Delaware patent case relied upon by CMO USA:
“The fact that Rule 7 does not specifically provide for a counterclaim in the reply is not persuasive. It purports only to identify permissible pleadings by their generic names.”

Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc., 50 F.R.D. 415 (D. Del. 1970).

Moreover, as another court recently explained, “‘aside from a rogue decision or two, courts have long agreed that the federal rules provide for a counterclaim in reply.’”

Power Tools & Supply, Inc. v. Cooper Power Tools, Inc., No. 05-CV-73615-DT, 2007 WL 1218701, *3 (E.D. Mich. April 20, 2007).

As it must, CMO USA concedes this point, citing two cases from the District of Delaware, including *Bancroft*, that affirm the right of a party, as provided by the Federal Rules, to plead counterclaims in a reply to counterclaims asserted against it. (D.I. 133, pg. 3.) CMO USA, however, attempts to create a limitation to this rule that has no basis in the Federal Rules or the case law, erroneously claiming that the right afforded by the Federal Rules to include a counterclaim in a reply does not include the right to assert that counterclaim against a third party. To make this argument CMO USA must ignore another Federal Rule that clearly states “[p]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.” Fed. R. Civ. P. 13(h).²

Courts liberally construe 13(h) “in an effort to avoid multiplicity of litigation, minimize the circuity of actions, and foster judicial economy. Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 1434 (2d Edition 1990) (citing cases); *Hoffman v. Wisner Classic Mfg. Co., Inc.*, 927 F.Supp. 67, 74 (E.D.N.Y. 1996) (explaining that

² Rule 19 provides for the joinder of person needed for a just adjudication. Fed. R. Civ. P. 19. Rule 20 provides for the permissive joinder of parties if there is asserted against them “any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” Fed. R. Civ. P. 20.

“Rule 13(h) is properly applied to patent infringement cases” and should be liberally construed). Here, CMO USA had already been joined to the 07-357 case as of June 12 when LPL served CMO USA with a counterclaim that LPL filed in reply to AUO’s complaint. (D.I. 75, Case No. 07-357.) CMO USA then cemented its status as a party to this case by replying to the counterclaim and asserting its own counterclaims against LPL on July 2. (D.I. 87, Case No. 07-357.) Thus, CMO USA is very much a part of this case. Despite the fact that it is a party and the patents are part of the case, CMO USA wants this Court to create a situation that forces LPL to bring a separate infringement suit against CMO USA on the same patents. CMO USA’s argument make no sense and flies in the face of the very goals the federal pleading rules are meant to further.

II. FORCING A SEPARATE SUIT INVOLVING THE SAME PARTIES AND THE SAME PATENTS RUNS COUNTER TO THE GOALS OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As noted above, the Federal Rules of Civil Procedure aim to avoid multiplicity of lawsuits, minimize the circuitry of actions, and foster judicial economy. Because AUO, AUO America, CMO, CMO USA, Viewsonic, and the Tatung Defendants have infringed and continue to infringe LPL’s LCD technology patents, LPL has been forced to seek redress in the courts. In response to LPL’s infringement suit, AUO and CMO sought to spread the patent dispute among these parties out over the entire country by filing lawsuits in Wisconsin and Texas, instead of asserting counterclaims in Delaware. The Western District of Wisconsin transferred AUO’s case to this Court for consolidation with LPL’s original suit and this Court subsequently consolidated the two cases to satisfy those objectives. (D.I. 49, Ex. 1, Case No. 07-357; D.I. 100, Case No. 07-357.)

Now, as the pleadings wind to a close in Delaware, CMO's subsidiary CMO USA seeks to duplicate suits and waste judicial resources. CMO USA asks this Court to dismiss some of LPL's LCD patent technology claims against one party and thus force LPL to bring those claims in a separate lawsuit. This Court should not now ignore the clear intent of the Federal Rules by granting CMO USA's motion to dismiss.

III. CMO USA'S "UNDULY COMPLICATED" ARGUMENT FAILS TO RECOGNIZE COMMON ISSUES OF FACT AND LAW.

Rule 13 provides courts with "broad discretion to allow claims to be joined in order to expedite the resolution of *all* the controversies between the parties in one suit." Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 1403 (2d Edition 1990) (citing cases). The distinction CMO USA attempts to make between compulsory and permissive counterclaims is a false one. There is nothing in the Rules that permits a court to discriminate against a permissive counterclaim. In fact, courts have regularly rejected the distinction CMO USA attempts to create:

Not one of the cases adopting [a limitation on permissive counterclaims asserted in a reply] has explained its rationale, and more importantly none of the cases adopting this rule have explained the consistency of this rule with the plain language of Rules 7 and 13. Applying that plain language as the Supreme Court has instructed [the federal courts] to do, it is clear that there is no distinction between permissive and compulsory counterclaims in terms of the requirements for proper pleading. . . . ***[I]mportantly, Rule 13(b) does not grant a court any power to refuse to hear a permissive counterclaim which is properly pleaded.***

Power Tools, 2007 WL 1218701 at *3 (emphasis added).

Rule 13 provides that a pleading *may* state any permissive counterclaim and *must* state any compulsory counterclaim. The word "may" is not intended to confer any discretion upon the court with respect to a permissive counterclaim; rather, it gives the litigant a choice either to assert or not to assert a permissive counterclaim. If he elects to plead it, the court must entertain it so long as it is within the court's subject matter jurisdiction."

Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973) (emphasis in original).

Both the words ‘compulsory’ in paragraph (a) and ‘permissive’ in paragraph (b) are a description of the rights of the pleader. Neither has any bearing upon the right or duty of the court when a counterclaim is presented.

Switzer Bros. v. Locklin, 207 F.2d 483, 488 (7th Cir. 1953).

Rule 13(b) by its terms grants an unqualified right to interpose . . . unrelated claims, and the court possesses no discretion to reject them.

United States ex rel. Kashulines v. Thermo Contracting Corp., 437 F. Supp. 195, 199 (D.N.J. 1976).

In an attempt to support its argument, CMO USA looks to *Metallgesellschaft AG v. Foster Wheeler Energy Corp.*, 143 F.R.D. 553 (D. Del. 1992), in which Judge Robinson dismissed counterclaims primarily because the case was already almost two years old. The court acknowledged that maintaining the permissive counterclaim in light of a dispute over subject matter jurisdiction would have required an additional round of jurisdictional discovery, further delaying the case. *Id.* at 559. There is no such subject matter jurisdictional dispute here. The only jurisdictional objection to LPL’s latest counterclaims is a renewed objection for lack of personal jurisdiction by CMO that must be settled regardless of whether or not LPL’s latest claims move forward against CMO USA.

In a further effort to support its argument that LPL’s counterclaims should be dismissed for unduly complicating matters, CMO USA creates a “numbers” red herring.³

³ In its attached exhibit, CMO USA apparently hopes to create an illusion of complexity and impression that there are many more counts than there really are by listing the same patents as many as *five* times on a single chart, including separate rows in a spreadsheet for each pleading, and restating the same counts over again for each separate defendant.

Its argument fails to recognize that the patents pending in the above captioned cases all involve LCD technology. As such, there is extensive commonality in the evidence relevant to all of the counterclaims. For example, electronic mask files depict structures included in LCD backplanes. These structures are relevant to some of the asserted patents in each round of claims and counterclaims. Similarly, manufacturing process specifications show steps used in manufacturing LCD backplanes, which again are relevant to some of the patents asserted prior to and in the latest counterclaims. Further, various engineering specifications illustrate structures, interfaces and assemblies relevant to each of the parties' asserted patents. It makes very good sense that the same jury in Delaware reviews and analyzes these complex engineering and manufacturing documents.

In addition, common sales and distribution evidence will be relevant in all the claims. Moreover, common evidence from the same third-party distributors and retailers will likely be relevant to the issues of inducement in all the claims. Common witness testimony will be also relevant to all the claims, particularly testimony from employees and officers familiar with the sales, advertising and marketing of LCD module products. Similarly, there is overlap of issues addressed by expert witnesses. These witnesses would have to testify multiple times if LPL was forced to bring its latest counterclaims against CMO USA in another lawsuit, clearly inconveniencing individuals, especially those who reside in Korea or Taiwan. This commonality of evidence weighs strongly in favor of rejecting CMO USA's arguments to dismiss LPL's counterclaims.

IV. CMO USA’S ARGUMENT THAT LPL SHOULD HAVE SOUGHT LEAVE TO FILE COUNTERCLAIMS IN ITS REPLY IS MERITLESS AND DIRECTLY CONTRARY TO THE LAW IN THIS DISTRICT

CMO USA initially concedes that Fed. R. Civ. P. 7 and the law in this District permits a party to file a counterclaim against another party in a reply to a counterclaim. (D.I. 133, p.3.) Perhaps in an attempt to further CMO’s previous argument regarding pleading procedures (*see* D.I. 119), CMO USA similarly argues that a counterclaim contained in a reply should instead be treated as an attempt to amend the complaint, citing a District of Kansas case and a stale Eastern District of Pennsylvania case. CMO USA’s argument runs directly contrary to the law in this District and, in any event, does not apply to the LPL counterclaims to which CMO USA objects.

As discussed and conceded by CMO USA, the District of Delaware understands that Rule 7 allows for the filing of a counterclaim in a reply to another counterclaim. *Joseph Bancroft*, 50 F.R.D. at 415. Contrary to CMO USA’s request, there is nothing in the Federal Rules of Civil Procedure that transforms an Rule 7 reply to new counterclaims into a Rule 15 amendment to an earlier pleading. By seeking to have this Court treat LPL’s additional counterclaims as a Rule 15 amendment, CMO USA, is essentially asking the Court to disregard the law in this District and to read a new procedure into the Federal Rules.

Not only does CMO USA urge this Court to change its law in the middle of the pleadings here, but to also apply that change to prejudice LPL by dismissing its additional counterclaims. LPL followed the Federal Rules and the law in this District when it filed its reply with counterclaims. It would be patently unfair for the Court to change the rules and then penalize LPL for not previously following the new rules before

they were even in place. Moreover, the cases CMO USA cites refer to an original plaintiff's assertion of a counterclaim in a reply to a defendant's counterclaim. CMO USA's argument then applies only to AUO's decision to assert counterclaims in its reply to the counterclaims contained in LPL's answer rather than amending its original complaint.⁴ This Court, having permitted AUO to reply to LPL's counterclaims with additional counterclaims cannot now reject LPL's complete and appropriate response to those counterclaims.

Should this court, however, agree with CMO USA's argument that a plaintiff's counterclaims contained in a reply should be treated as an amendment to the original complaint, it should apply that procedure to AUO's counterclaims filed on June 21 (D.I. 81-82, Case No. 07-357) and amended on July 10 (D.I. 92-93, Case No. 07-357). Should the Court follow this path and grant AUO leave to amend its complaint, Rule 15(a) provides LPL with the opportunity to respond anew as it sees fit. *Joseph Bancroft*, 50 F.R.D. at 419; *Satellite Financial Planning Corp. v. First National Bank of Wilmington*, No. 85-463, 1987 WL 7189, *1 (D. Del. Feb. 5, 1987). Such a response may include the additional counterclaims that CMO USA seeks to dismiss. *Tralon Corp. v. Cedarapids, Inc.*, 966 F.Supp. 812, 832 (N.D. Iowa 1997) (citing *Joseph Bancroft*, 50 F.R.D. at 419).

⁴ Indeed, CMO USA's displeasure should be directed toward AUO instead of LPL. It is AUO who first chose to disrupt the proceedings by filing suit elsewhere, rather than filing counterclaims in LPL's original suit. Then, as Plaintiff, AUO filed two rounds of counterclaims rather than amending its initial complaint in the manner CMO USA believes is appropriate. LPL is merely protecting itself and asserting its rights in compliance with the Federal Rules 7 and 13 by fully responding to each of AUO's additional counterclaims with appropriately asserted counterclaims related to AUO's new claims.

CONCLUSION

For the foregoing reasons, this Court should deny CMO USA's motion to dismiss and/or strike LPL's additional counterclaims.

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